Leather Center, Inc. *and* International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL–CIO. Cases 16–CA–15227 and 16–RC–9424

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On April 6, 1993, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order as modified and set forth in full below.[5]

[1] The Respondent has not excepted to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by promulgating and maintaining its no-solicitation or no-distribution rule and its policies regarding posting of literature and confidentiality of wage policies.

[2] The Respondent has excepted to the judge's ruling, upon the General Counsel's request, that the judge take notice of a prior decision regarding these parties. See *Leather Center, Inc*., 308 NLRB 16 (1992). Our examination of the record indicates that the judge reviewed only one page of this prior decision for the limited purpose of evaluating the credibility of a particular witness in the instant case. We find the judge did not err in considering witness statements in this earlier decision.

[3] The judge inadvertently stated that the Union filed its unfair labor practice charge on September 20, 1991, when in fact the charge was filed on September 16, 1991. The judge also inadvertently misspelled the last name of one eligible voter in sec. III,F,3 of his decision, referring to Eli Hague as ''Haig.''

[4] We are amending the judge's Conclusions of Law to comport with the language of the complaint allegations that the Respondent violated Sec. 8(a)(1) of the Act by promulgating and maintaining seven personnel policies contained in its ''Leather Center Associate Manual.'' We are further amending the Conclusions of Law to reflect the judge's findings that the Respondent engaged in objectionable conduct by disparately enforcing its no-solicitation or no-distribution rule and its restriction on the wearing of caps, and that such disparate enforcement also violated Sec. 8(a)(1) of the Act. Although the latter 8(a)(1) violations were not specifically alleged in the complaint, they were fully litigated at trial. See *Facet Enterprises*, 290 NLRB 152, 153 (1988), enfd. 907 F.2d 963 (10th Cir. 1990).

On the other hand, there was no objection and no 8(a)(1) allegation concerning the Respondent's enforcement of its rule requiring permission for postings. There is also a substantial question as to whether this issue was fully litigated. In view of these considerations and in light of the fact that we are ordering that the rule be rescinded, we do not pass on the judge's finding that the Respondent violated Sec. 8(a)(1) by its enforcement of that rule.

[5] We are amending the judge's recommended remedy to remand the representation proceeding to the Regional Director to open and count the determinative challenged ballots of the nine eligible voters, because the disposition of these determinative challenges may render a second election unnecessary.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 3, and retain subparagraphs 3(a) through (g).

''3. Leather Center violated Section 8(a)(1) of the Act and prevented a free and fair election on September 20 by promulgating and maintaining the following rules or policies during the second IUE campaign prior to the September 20 election:''

2. Substitute the following for paragraph 4.

''4. Leather Center violated Section 8(a)(1) of the Act and prevented a free and fair election on September 20 by its disparate enforcement of its rules and policies regarding employee solicitations and distributions and the wearing of caps.''

3. Insert the following as paragraph 5, and renumber the subsequent paragraphs.

''5. The conduct described above in paragraph 4 constitutes objectionable conduct affecting the results of the September 20, 1991 election.''

AMENDED REMEDY

The judge recommended, inter alia, that the September 20, 1991 election be set aside, that a second election be held, and that it was accordingly unnecessary to open and count the determinative challenged ballots of the nine eligible voters. These determinative challenged ballots may render a second election unnecessary, however. See *Pay N' Save Stores*, 291 NLRB 979 (1988). We accordingly modify the judge's remedy to remand this proceeding to the Regional Director to open and count these nine determinative challenged ballots, and to prepare and serve on the parties a revised tally of ballots. The Regional Director shall issue the appropriate certification of representative if the Union receives a majority of the valid ballots cast. If the Union does not prevail, however, the Regional Director shall set aside the election because of the Respondent's objectionable conduct and other unlawful conduct during the critical period prior to the election, and shall conduct a new election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Leather Center, Inc., Carrollton, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining in effect the following rules or policies contained in its Leather Center Associate Manual:

(1) Requiring employees to secure its permission prior to soliciting other employees, distributing literature to other employees, or posting literature within the facility.

(2) Barring employees from discussing with other employees their and other employees' wages.

(3) Barring employees from generating and/or encouraging rumors.

(4) Barring employees from discussing Leather Center policies and/or practices with representatives of the media.

(5) Limiting the wearing of caps by employees within the plant to caps bearing Leather Center insignia.

(6) Requiring employees to promise in writing to comply with Leather Center's antiunion policy.

(7) Permitting employees who oppose representation by the International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL–CIO to solicit other employees to join their opposition, to distribute literature supporting their views, and to wear Leather Center insignia on their caps, while barring employees who support such representation from such solicitation, distribution, or wearing caps with union insignia.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Rescind the rules or policies: (1) requiring employees to secure Leather Center's permission prior to soliciting other employees, distributing literature to other employees, and posting literature within the plant; (2) barring employees from discussing with other employees their wages and the wages of other employees; (3) barring employees from generating or encouraging rumors; (4) barring employees from discussing with media representatives Leather Center policies and/or practices; (5) barring employees from wearing caps bearing union insignia; and (6) requiring employees to sign a statement promising to comply with Leather Center's antiunion policy.

(b) Notify employees who have signed statements promising to comply with Leather Center's rules and policies they are not required to comply with Leather Center's antiunion policy.

(c) Post at its plant at Carrollton, Texas, in English and Spanish, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 16–RC–9424 is severed from Case 16–CA–15227, and that Case 16–RC–9424 is remanded to the Regional Director for Region 16 in order to open and count the ballots of Yvonn Acy, Jose Arrendondo, Cladia Espanozia, Diana Garcia, Eliseo Gonzalez Sr., Eli Hague, Elio Sanchez, Ron Torres, and Julio Vega, and to prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification of representative if the Union receives a majority of the valid ballots cast. If, however, the Union should not prevail, the Regional Director shall set aside and other unlawful conduct during the critical period prior to the election, and conduct a new election.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate and maintain in effect the following rules or policies contained in our Leather Center Associate Manual:

(1) Requiring you to get our permission before soliciting other employees, distributing literature to other employees, or posting literature within the plant.

(2) Barring you from discussing your and other employees' wages.

(3) Barring you from generating or encouraging rumors.

(4) Barring you from discussing our policies and/or procedures with representatives of the media.

(5) Limiting you to wearing a cap containing Leather Center insignia in the event you choose to wear a cap within the plant.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(6) Requiring you to promise to comply with our antiunion policy.

(7) Permitting employees who are opposed to union representation to solicit other employees to join in that opposition, to distribute literature to other employees expressing opposition to union representation, and to wear caps containing our insignia while barring employees who support union representation from such solicitations, distributions, and the wearing of caps containing union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our rules or policies requiring you to secure our permission prior to soliciting other employees, distributing literature to other employees, or posting literature within the plant.

WE WILL rescind our rule or policy barring you from discussing your and other employees' wages.

WE WILL rescind our rule or policy barring you from generating and/or encouraging rumors.

WE WILL rescind our rule or policy barring you from discussing with representatives of the media our policies and/or practices.

WE WILL rescind our rule requiring you, in the event you wish to wear a cap at work, to wear only a cap bearing our insignia.

WE WILL rescind our rule or policy requiring you to promise to comply with our antiunion policy and WE WILL notify you that you do not have to comply with that policy.

LEATHER CENTER, INC.

Edward B. Valverde, for the General Counsel.
William B. Finegan (Haynes & Boone), of Dallas, Texas, for the Respondent.
Jaime P. Martinez, of San Antonio, Texas, for the Union.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On September 20, 1991,[1] Region 16 of the National Labor Relations Board (the Board) conducted an election among a unit of employees of Leather Center, Inc. (Respondent) to decide whether a majority of the unit employees desired representation by the International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL–CIO (IUE) in Case 16–RC–9424. The tally of the election results reflected challenges to 15 of the ballots cast, a sufficient number to affect the results of the election.

On the same date, IUE filed a charge with Region 16 in Case 16–CA–15227 alleging rules promulgated by Respondent on April 1 and maintained in effect thereafter interfered with, restrained, and coerced unit employees in the exercise of their rights under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

IUE shortly thereafter filed timely objections to the election on the ground preelection conduct by Respondent prevented a free and fair election, including an objection that Respondent's enforcement of rules alleged to be violative of the Act in the IUE charges also prevented a free and fair election.

On October 28 Region 16 issued a complaint based on IUE's September charges.

On November 5 the Regional Director for Region 16 consolidated the two cases for purposes of hearing and recommended disposition of the issues raised by the challenges, the objections, and the complaint allegations.

I conducted a hearing on those issues at Fort Worth, Texas, on January 12, 1993. The General Counsel and Respondent appeared by counsel and IUE appeared by the secretary-treasurer of its District 11. All three were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. The General Counsel and Respondent filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT[2]

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times Respondent was an employer engaged in commerce in a business affecting commerce and IUE was a labor organization within the meaning of Section 2 of the Act.

II. THE UNIT

Prior to the September 20 election, IUE and Respondent agreed the following unit was appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act:

> INCLUDED; All production and maintenance employees, including wood shop, leather shop, shipping, receiving, pattern cutting and research and development departments and customer service employees employed by the Employer at its Carrollton, TX facilities.
>
> EXCLUDED; All other employees, professional employees, confidential employees, office employees, truckdrivers, guards and supervisors as defined in the Act.

Based on the foregoing, I find at all pertinent times the above-described unit was appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act.

[1] Read 1991 after further date references omitting the year.

[2] While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

III. THE ALLEGED UNFAIR LABOR PRACTICES, PREVENTION OF A FAIR ELECTION AND CHALLENGES

A. *Preliminary*

1. The complaint

The complaint alleged Respondent's promulgation, maintenance, and enforcement of a number of rules or policies following a 1990 representation election and prior to a 1991 representation election violated Section 8(a)(1) of the Act.

The complained of rules or policies concerned unit employee: (1) solicitations of other unit employees and distributions to other unit employees within plant facilities; (2) posting of material within the plant; (3) discussion with other employees of wages; (4) generation of and/or encouraging rumors; (5) communications with media representatives; (6) compliance with Respondent's antiunion policy; and (7) wearing of union insignia, i.e., caps containing IUE insignia.

2. The election objections

The election objections alleged Respondent prevented a free and fair election by:

> 1. The forcing a ''vote no'' sticker on a unit employee/IUE supporter the day before the second election; and
>
> 2. Threatening a unit employee/IUE committeeman for wearing IUE cap insignia on plant premises prior to the second election.

A third IUE objection was withdrawn by IUE prior to the close of the hearing.

3. The ballot challenges

The final tally at the September 20 election reflected 86 votes for IUE representation, 90 votes against IUE representation, and 15 ballot challenges, a number sufficient to affect the election results.

IUE challenged ballots cast by Jose Arrendondo, Eliseo Gonzalez Sr., Elio Sanchez, Ron Torres, and Julio Vega on the ground Arrendondo, Sanchez, Torres, and Vega were supervisors and Gonzalez Sr. was a supervisor and agent of Respondent.

The election officer challenged the ballots cast by Yvonn Acy, Maria Andrada, Genera Bautista, Cladia Espanozia, Diana Garcia, Eli Hague, Refugio Merez, and Martha Moya on the ground their names did not appear on the voter eligibility list furnished by Respondent prior to the election.

Prior to the close of the hearing, IUE withdrew its challenges to the ballots cast by Arrendondo, Sanchez, Torres, and Vega; the parties agreed the election officer's challenge to the ballots cast by Acy, Espanozia, Garcia, and Hague should be overruled, inasmuch as they were in layoff status awaiting recall; and Respondent conceded the validity of the IUE challenges to the ballots cast by Mora and Setz inasmuch as they were not employees within the unit.

Left for my recommended disposition is the question of whether the IUE challenge to the ballot cast by Gonzalez Sr. and the election officer's challenges to the ballots cast by Andrada, Bautista, Merez, and Moya should be counted or rejected.

B. *Background*

IUE began the organizing campaign among the unit employees which culminated in the first election in February 1990.

The election was held in June 1990 (Case 16–RC–9308).

IUE lost the election, filed objections thereto alleging Respondent's preelection conduct prevented a free and fair election, filed charges Respondent committed unfair labor practices during the election campaign, and the Region issued a complaint based on the charges (Case 16–CA–14624).

A hearing on the election objections and unfair labor practices was conducted by Judge Wacknov in June, July, and August 1991 (the RC and CA cases were consolidated for hearing and decisional purposes).

During the hearing, IUE announced it was withdrawing its objections to the election and requesting the issuance of a decision certifying the results of the election, to enable IUE to file a new petition for certification (since a year had passed since the first election).

IUE submitted the request, the results of the first election were certified, and in August 1991 IUE filed a petition for certification as the exclusive representative of Leather Craft employees within the unit described above—Case 16–RC–9424—and commenced a second organizational campaign among Respondent's employees.

Judge Wacknov issued his decision in Case 16–CA–14624 in March 1992, finding Respondent committed violations of the Act and recommended remedies therefor. In July 1992 the Board adopted Judge Wacknov's findings and conclusions and directed Respondent to comply with the recommended remedies (308 NLRB 16).

C. *Leather Craft Rules or Policies Prior to the First Election*

Prior to and during the time IUE conducted its first organizing campaign and the date of the first election and continuing thereafter until April 1991, while the IUE objections in Case 16–RC–9308 and the unfair labor practice case (Case 16–CA–14624) were pending and unresolved:

1. Respondent did not issue, post, or distribute to unit employees any written rules or regulations governing solicitations or distributions on Respondent's premises or other rules restricting employee communications.

2. The wearing of caps while on the premises was left to employee choice, i.e., Respondent had no rule or policy governing the wearing of caps at the facility. During the IUE campaign preceding the first election, unit employees/IUE supporters distributed caps containing IUE insignia on and within the plant facility and grounds during morning, afternoon, and lunchbreaks, as well as before and after work, in nonworking areas (the employee cafeteria, the gymnasium, the sports facilities and the parking lot) and Respondent's supervisors distributed brightly colored caps containing the caption ''I LUV LEATHER CENTER'' during working time. During the IUE campaign preceding the first election, some unit employees wore the IUE caps while working, others wore the company caps while working, and still others wore caps bearing sports teams insignia. Respondent made no effort to restrict the wearing of any of the caps.

3. During the periods and in the areas described above, unit employees/IUE supporters, as well as unit employees

who did not support IUE, freely communicated their views on all and any subjects (it may be safely presumed their communications included expressions of support for IUE representation and vice versa; their wages, rates of pay, hours, and working conditions; reports and rumors concerning IUE and company propoganda, policies, and intentions; as well as any other subject of mutual interest). Such communications were not regulated by Respondent in any manner whatsoever.

4. Employees posted sales notices, notices of football pools, and a unit employee/IUE supporter posted a document pertaining to the first election on company bulletin boards and on inside walls of the facility. Respondent did not regulate or prevent those postings.

5. A former supervisor and senior employee (Eliseo Gonzalez Sr.) circulated among employees during working time in working areas, as well as during breaks and in nonworking areas, soliciting unit employee participation in sports betting pools, without censure or securing advance permission therefor.

D. *The Promulgation and Maintenance of New Rules or Policies Preceding the Second Election*

1. The promulgation

On April 1, 1991, during IUE's second organizing campaign prior to the second election, Respondent prepared and distributed to each employee a document titled ''Leather Center Associate Manual.'' The manual has been distributed to each employee hired after April 1, 1991. The manual contains a page, which each recipient was required to sign and date, stating: ''I have received the manual and I understand that it is my responsibility to read and comply with the policies contained in this manual and any revisions made to it.'' Following such execution, the page was removed from the manual and placed in each employee's personnel file.[3]

2. Pertinent provisions of the manual

The manual states:

> Solicitation or distribution of literature by associates is limited to the nonpublic areas of the building during breaks.
>
> Any Leather Center associate who desires to solicit or distribute literature in the work place must receive prior written permission from the Human Resources Department . . . Failure to do so may result in disciplinary action up to and including discharge.
>
> All posted items must be approved by the Human Resources Department.
>
> It is expected that associates will keep confidential any Leather Center information to which they have access. Examples of confidential information include: . . . wages of other associates . . .
>
> A rumor is defined as a ''report of uncertain origin and uncertain truthfulness.'' Rumors at Leather Center will not be tolerated. Disciplinary action will be taken to those found generating or encouraging rumors.
>
> Only an officer of Leather Center is to make any comment to any member of the media. If you are approached by a member of the media for information, you should refer the individual to an officer of Leather Center.
>
> Our Company is union free, and we intend to lawfully remain this way. We believe your needs and ours are best met by avoiding the addition of an outside third party to come between us.
>
> Leather Center will provide each February: . . . l Leather Center cap . . . This attire must be worn during all working hours.
>
> Production Attire:
>
> Caps (optional): Leather Center cap (black with white lettering only).
>
> Associates will not be allowed to work unless properly attired.
>
> The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including discharge.
>
> Violation of personnel policies.
>
> Unsatisfactory . . . conduct.
>
> Disclosure of confidential information.
>
> Improper use of dress code.
>
> Leather Center Associate Manual Acknowledgement Form: I (acknowledge I) have received the manual, and I understand that it is my responsibility to read and comply with the policies contained in this manual and any revisions made to it.

3. Maintenance and enforcement

The rules or policies recited above have remained in full force and effect since their April 1, 1991 promulgation.

As a result, during the IUE campaign prior to the second election:

1. Unit employees/IUE supporters have refrained from identifying themselves as IUE supporters by complying with the rule or policy requiring the securing of advance permission for soliciting other employees to support IUE and for distributing IUE literature to other employees within Respondent's facilities during their breaks and before and after work and refrained from engaging in such solicitations and distributions.

2. Unit employees/IUE supporters have refrained from identifying themselves as IUE supporters by complying with the rule or policy requiring the securing of advance permission for posting any IUE material on bulletin boards or walls and refrained from any such postings.

3. Unit employees have been barred from discussing their and other employees' wages at all times and places.

4. Unit employees have been barred from discussing rumors at all times and places.

5. Unit employees have been barred from discussing Respondent's policies and actions with representatives of the media at all times and places.

6. Unit employees have been required to promise in writing to comply with Respondent's antiunion policy.

7. Unit employees have been barred from wearing IUE cap insignia within the facility.

8. A unit employee who opposed IUE representation during both campaigns, Eliseo Gonzalez Sr., during both campaigns persisted, during working time as well as breaktime,

[3] The manuals were available in both English and Spanish versions and each employee was given a manual in the language which he or she understood.

in soliciting other employees to participate in betting pools within the full view and participation by supervisory personnel, without securing any advance permission therefor.

9. A unit employee/IUE supporter was denied management permission to distribute during a break-in a nonworking area.

10. A supervisor prepared and affixed approximately 50 notices announcing terms for the sale of his auto on walls within the facility, without censure or prevention thereof by management personnel.

11. A maintenance employee within the unit who was opposed to IUE representation moved about the plant performing his duties during working time while wearing one of the brightly colored caps Respondent distributed prior to the first election containing Respondent's insignia, in full view of supervisory personnel, without censure or prevention, while a unit employee/IUE supporter was instructed by his supervisor to remove a cap with IUE insignia when he donned that cap after seeing the maintenance employee wearing the cap just described.

12. The day before the second, September 20 election, during working time, Eliseo Gonzalez Sr., in full view of supervisory personnel and many employees, solicited unit employees at their work stations, on working time, to accept and wear approximately 25 ''VOTE NO'' stickers, without censure or prevention.

E. *The Challenges*

1. Eliseo Gonzalez Sr.

IUE contends at the time of the election Gonzalez was a supervisor and/or an agent of Respondent within the meaning of the Act and therefore ineligible to vote.

Gonzalez was hired by Respondent when it began business, in 1982. He progressed to a supervisory position, but since 1987 has been Respondent's one and only patternmaker, a classification clearly included within the unit.

While Gonzalez moved freely about the plant in the performance of his duties (which were limited to making and delivering patterns as needed) and was respected by other employees due to his long-term, senior employee and former supervisor status, the record fails to establish Gonzalez either possessed or exercised the power on Respondent's behalf to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action.

Nor does the record establish Respondent authorized Gonzalez to act as its agent or ratified his acts after acquiring knowledge thereof.

2. Maria Andrada, Genera Bautista, Refugio Merez, and Martha Moya

The election officer challenged the ballots cast by Andrada, Bautista, Merez, and Moya because their names were not listed on the voter eligibility list provided by Respondent.

Respondent did not list the names of the four because their employment was terminated on June 21, 1991, prior to the eligibility period for participation in the election (all four received formal, written notice of that termination on June 21, 1991).

It was undisputed the four were terminated under a company rule or policy each employee, including the four, was furnished by virtue of their receipt of the April 1, 1991 manual, which states:

> MEDICAL LEAVE
>
> Eligible associates will be granted leave for the period of the disability, up to a maximum of 84 calendar days (12 weeks) per year. After 84 days of medical leave, if you have not returned to work, your employment will be terminated.

It was undisputed the four had been off work in excess of 84 calendar days on medical leave at the time they were terminated.

F. *Conclusions*

1. The alleged unfair labor practices

In *Beth Israel Hospital v. NLRB*, 487 U.S. 483, 491 (1978), the Supreme Court stated:

> The right of employees to self-organization . . . necessarily encompasses the right to communicate with one another regarding self-organization at the jobsite (citing *Republic Aviation*, 324 U.S. 793 (1945), and *Central Hardware Co.*, 407 U.S. 519 (1972)).

and in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956), went on to say:

> No restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline (again citing *Republic Aviation*, supra).

thus:

> Any rule that requires employees to secure permission from their employer as a precondition to engaging in protected, concerted activity on a employee's free time and in nonwork areas is unlawful.[4]

The above-recited cases invalidate Respondent's no-solicitation, no-distribution rule or policy, since the rule or policy requires any employee to seek and secure employer permission prior to soliciting another employee to support IUE representation of the unit employees or to distribute IUE material to another employee ''in the work place;'' i.e., anywhere within the plant and whether the would be solicitor or distributor and any employee he or she solicits or distributes to is at work or on a break, and whether they are in a work area or a nonwork area.[5]

Even absent the advance permission requirement, Respondent's promulgation, maintenance, and enforcement of

[4] *Brunswick Corp.*, 282 NLRB 794, 795 (1987). To similar effect, *St. Agnes Medical Center*, 287 NLRB 242 (1987), affd. 871 F.2d 137 (D.C. Cir. 1989); *Emergency One*, 306 NLRB 800 (1992); *Norris-O'Bannon*, 307 NLRB 1236 (1992); *Anderson Co.*, 305 NLRB 878 (1992); *Soltech, Inc.*, 306 NLRB 269 (1992).

[5] That Respondent so interprets and applies the rule or policy was demonstrated by its denial of an IUE supporter's request to distribute material during his break and in a nonwork area.

the rule or policy is suspect, since solicitations and distributions by IUE supporters were not regulated during the first IUE campaign preceding the first election but were placed in effect during the second IUE campaign and prior to the second election, for the obvious purpose of inhibiting the employees's self-organization efforts.

The Board has consistently held the promulgation, maintenance, and enforcement of such a rule or policy for that purpose is unlawful,[6] particularly where, as here, the rule or policy was disparately enforced by permitting Gonzalez Sr. to solicit numerous employees in full view of other employees and supervisors to wear the ''Vote No'' stickers he was distributing the day before the election.[7]

On the basis of the foregoing, I conclude by promulgating its April 1, 1991 no-solicitation, no-distribution rule or policy and maintaining that rule or policy in full force and effect during IUE's second campaign prior to the second election and disparately enforcing that rule or policy, Respondent violated Section 8(a)(1) of the Act.

The same considerations apply to Respondent's rule or policy requiring employees to secure Respondent's permission prior to posting any material within the plant.

During the first IUE campaign and prior to the first election, employees posted for sale announcements, an IUE-prepared document and other material within the plant without interference; during the IUE's second campaign and prior to the second election, Respondent required employees to secure its permission for any postings, but made no effort to prevent a supervisor's posting of a sale announcement.

The cases are legion wherein the Board has held the promulgation, maintenance and enforcement of such a rule or policy is violative of the Act.[8]

As Judge Taplitz stated in the *Lassen* case, supra:

> The practice was for the employees to post whatever they saw fit and there were no restrictions placed on the postings.
>
> . . . .
>
> [then] Respondent issued a new employee handbook which changed the rules with regard to bulletin boards and provided that all material for posting had to be approved by the administrator. . . . The rule was not uniformly followed.
>
> . . . .
>
> Respondent began enforcing its rule that notices had to have prior approval within months after the union began an organizational drive.
>
> . . . .
>
> Respondent's reactivation, maintenance and enforcement of its rule requiring prior approval of employee notices for posting on bulletin boards could be reasonably said to interfere with the free exercise of employee rights under the Act.
>
> . . . .
>
> Respondent failed to substantiate its claim that there was a legitimate business need for its rule requiring prior approval of employee notices.

In *Peck, Inc.*, 269 NLRB 451, 458 (1984), the Board adopted the finding of an administrative law judge that an employer revealed its motive was to discourage union activity by requiring prior approval for employee notices on a bulletin board, when there was no demonstration of a legitimate business reason for the rule. For other cases where ''prior approval'' rules were found to be invalid, see *Predicasts, Inc.*, 270 NLRB 1117 (1984); *G. H. Bass & Co.*, 258 NLRB 140 (1981).

The facts in this case are practically identical. Respondent permitted employee postings prior to and during the first election campaign but, faced with a second campaign and election, required employees to secure permission for any postings in the second election, enabling it to anticipate and prevent any pro-IUE postings, meanwhile making no attempt to bar a posting having no union connotations.

I conclude, on the basis of those facts and the cases cited above, Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing its rule or policy requiring that employees secure its permission prior to posting any material in the plant.

Respondent's rule or policy barring employees from any discussion of wages is a general bar restricted neither in time nor place.

Such a bar is unlawful. As the Board stated in *Waco, Inc.*, 273 NLRB 746 (1984):

> There can be little question that the Respondent's rule prohibiting employees from discussing their wages constitutes a clear restraint on employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment.

That principle has been uniformly applied, in *Waco* and subsequent decisions, all concluding any employer attempt to restrict its employees' discussion of their and other employees wages violates Section 8(a)(1) of the Act.[9]

On the basis of the foregoing, I conclude Respondent violated Section 8(a)(1) of the Act by promulgating and main-

[6] *Mack's Supermarkets*, 288 NLRB 1082 (1988); *Hunter Douglas*, 277 NLRB 1179 (1985), enfd. 804 F.2d 808 (3d Cir. 1986); *Harry M. Stevens*, 277 NLRB 276 (1985), enfd. 793 F.2d 1288 (5th Cir. 1986).

[7] *Thomas Steel Corp.*, 297 NLRB 1025 (1990); *Electronic Data Systems*, 278 NLRB 125 (1986); *Premier Maintenance*, 282 NLRB 10 (1986); *Gencorp*, 294 NLRB 717 (1989); *Polynesian Hospitality Tours*, 297 NLRB 228 (1989); *S. E. Nichols*, 284 NLRB 556 (1987), enfd. 862 F.2d 952 (2d Cir. 1988); *Emergency One*, supra; *Pacesetter Corp.*, 307 NLRB 514 (1992); *Willamette Industries*, 306 NLRB 1010 (1992). Also see *Gonzales Packing Co.*, 304 NLRB 805 (1991).

[8] *Southwire Co.*, 277 NLRB 377 (1985), enfd. 801 F.2d 1252 (11th Cir. 1986); *Presser Industries*, 278 NLRB 819 (1986); *Connecticut Color*, 288 NLRB 699 (1988); *St. Anthony's Hospital*, 292 NLRB 1304 (1989); *Lassen Community Hospital*, 278 NLRB 370 (1986); *Central Vermont Hospital*, 288 NLRB 514 (1988); *Springfield Jewish Nursing Home*, 292 NLRB 1266 (1989); *Best Lock*, 305 NLRB 648 (1992); *Bon Marche*, 308 NLRB 184 (1992).

[9] *Independent Stations*, 284 NLRB 394 (1987); *Heck's, Inc.*, 293 NLRB 1111 (1989); *Elston Electronics Corp.*, 292 NLRB 510 (1989); *Apparatus Service*, 296 NLRB 589 (1989); *Super One Foods*, 294 NLRB 462 (1989), enfd. 919 F.2d 359 (5th Cir. 1990); *Vanguard Tours*, 300 NLRB 250 (1990), enfd. 981 F.2d 62 (2d Cir. 1992); *Sweetwater Crafts*, 300 NLRB 18 (1990); *Highland Superstores*, 301 NLRB 199 (1991); *Automatic Screw Products*, 306 NLRB 1072 (1992); *Willamette Industries*, supra; *Mast Advertising & Publishing*, 304 NLRB 819 (1992).

taining its rule or policy prohibiting employees from engaging in any discussion of their and other employees' wages.

Turning next to the company rule or policy prohibiting employees from generating and/or encouraging rumors, again the rule or policy has general applicability, i.e., it bars such discussions at any time at any location, under threat of discipline.

It is a fact of life, particularly in the context of an organizing campaign, that rumors concerning anticipated or feared employer reactions, rumors concerning union tactics and practices, rumors concerning the reactions of management personnel, etc., spread throughout a plant, through word of mouth. Some may prove to be true predictions of subsequent actions or events, some may not.

While an employer may restrict employee communications during their worktime in work areas in the interests of maintaining production or discipline, provided such restrictions are not, as here, imposed to restrict employee communications concerning union representation, their working conditions, etc., after a previous policy of permitting unlimited communication, an employer has no legitimate grounds for restricting employee communication on any subject, during their nonworking time in nonworking areas and outside, on their own free time and certainly Respondent failed to demonstrate any basis for the imposition of such a restriction on its employees. Rather, it appears the restriction was enacted to intimidate and restrain its employees in the exercise of their right to exercise their Section 7 right to speculate and to discuss issues and concerns which arose during the second IUE campaign preceding the second election.

The issue is not novel; the Board has had several cases before it in which employers sought to restrict their employees' communications during campaigns preceding representation elections, and has adopted the general principle the promulgation, maintenance, and enforcement of such restrictions, which clearly could encompass discussions of rumors emanating from employer or union propoganda, statements by employer and union representatives, etc., unduly restrict employees in the exercise of their right to self-organization and are violative of the Act.[10]

As the Board stated in *Independent Stations*, id. at 396–397:

> Section 7 protects merely inaccurate employee statements. The rule runs afoul of the fact that these false statements may well relate to concerted activities. Thus, the rule violates Section 8(a)(1) of the Act.

What Respondent defines as ''rumors'' almost certainly involve employee discussions of matters of vital concern to them during a campaign preceding a representation election, as here.

I thus conclude by promulgating and maintaining in full force and effect its prohibition of employee discussion of rumors during the second IUE campaign preceding the second election, Respondent violated Section 8(a)(1) of the Act.

Respondent's attempted prohibition of any employee discussion of Respondent's policies and practices with any representative of the media constitutes another unlawful Respondent attempt to restrict IUE supporters among the unit employees from going public with what they perceived to be shortcomings in Respondent's treatment of its employees, warranting their seeking union representation, protection, and aid in rectifying those perceived shortcomings and their attempted enlistment of media support to accomplish their goals.

The Board has consistently held employees have a right under Section 7 of the Act to convey their complaints or grievances against their employers to representatives of the media as well as other third parties, in an effort to secure favorable coverage and/or aid and support.[11]

As the Board stated in *Kinder Care*, id. at 1171 and 1172:

> Under Section 7 of the Act, employees have the right to engage in activity for their ''mutual aid or protection,'' including communications . . . directed to other employees, an employer's customers, its advertisers, its parent company, a news reporter, and the public in general.

On the basis of the foregoing, I conclude Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining in full force and effect its rule or policy prohibiting employees from discussing Respondent and its policies and procedures with representatives of the media.

With respect to the requirement unit employees support Respondent in its opposition to union representation of its employees, Respondent's expression of its antiunion policy is set forth in clear and unmistakeable terms; i.e., the applicable provision in its employee manual is headed ''Union Free Employee Relations'' and goes on to state Respondent was currently union free and intended to remain that way, since it believed its needs and those of the unit employees were best served by avoiding having to deal with the unit employees's wants and desires concerning their rates of pay, wages, hours, and working conditions through a collective-bargaining representative of the employees' choosing.

The manual also clearly states any employee who violates Respondent's personnel policies and any employee whose conduct is deemed ''unsatisfactory'' by Respondent, is subject to discipline, including discharge.

The manual also requires each unit employee to acknowledge receipt of the manual and to promise to comply with the policies set out therein. His or her signed agreement is then detached from the manual and made part of his or her personnel file.

As the Board stated in *Heck's, Inc.*, 293 NLRB 1111, 1120 (1989):

> In essence, employees are ''requested'' to promise in writing to be bound by, inter alia, the Respondent's antiunion policy; these written promises are made a

[10] *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979); *Radisson Muehleback Hotel*, 273 NLRB 1464 (1985); *Independent Stations*, 284 NLRB 395 (1987); *Josten Concrete Products*, 295 NLRB 1029 (1989); *Southern Maryland Hospital*, 293 NLRB 1209 (1989), enfd. 916 F.2d 932 (4th Cir. 1990); *Advo Systems*, 297 NLRB 926 (1990); *88 Transit Lines*, 300 NLRB 177 (1990).

[11] *Auto Workers Local 980*, 280 NLRB 1378 (1986), enfd. 819 F.2d 1134 (3d Cir. 1987); *Kinder Care Learning Centers*, 299 NLRB 1171 (1990); *Communications Workers Local 9509*, 303 NLRB 264 (1991).

> matter of record in the employees' personnel files; and employees could reasonably assume that they are subject to discipline culminating in discharge for violating the Respondent's antiunion policy. We find that the Respondent's conduct in this regard has an inherent and direct tendency to interfere with, restrain and coerce employees in the exercise of their rights under Section 7 of the Act to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Employer has effectively asked its employees to promise in writing not to engage in any of these protected Section 7 activities and has warned them that they will be disciplined if they do so. We conclude that the Respondent has violated Section 8(a)(1) of the Act.

For additional authority to the same effect, see the cases cited in *Heck's, Inc.*, supra at 1120 fn. 14.

On the basis of the foregoing, I conclude Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining in full force and effect its rule or policy requiring unit employees to promise to comply with its antiunion rule or policy.

As to the cap rule or policy, while during the first IUE campaign preceding the first election, Respondent issued caps to employees who supported its antiunion policy bearing Respondent's insignia and IUE issued caps with IUE insignia to employees who supported IUE representation and both the IUE supporters and the Respondent supporters wore those caps while at work, prior to the second IUE campaign and the second election Respondent prohibited the wearing of any cap other than one bearing Respondent's insignia and disparately enforced that policy thereafter, requiring an IUE supporter to remove his cap containing IUE insignia while permitting another employee to wear the same cap Respondent distributed to its supporters prior to the first election.

The wearing of union insignia while at work to express employee solidarity has long been recognized as an exercise of employee rights under Section 7 of the Act (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)), subject to employer limitation or ban only when the employer can show by substantial evidence wearing of the insignia in question affected production or was necessary to maintain discipline (*NLRB v. Malta Construction Co.*, 806 F.2d 1009 (11th Cir. 1986)).

An employer effort to limit or ban the wearing of such insignia, including a cap bearing union insignia, is particularly suspect when the employer institutes a ban on the wearing of union caps during a union organizing campaign, reversing a former policy of permitting the wearing of caps bearing various insignia, such as those of football or baseball teams, etc. (*Sears, Roebuck & Co.*, 305 NLRB 193 (1991)), or the enactment and maintenance of a rule limiting employees to the wearing of uniforms containing employer insignia when faced with a union campaign to organize the employees (*Pepsi Cola Bottling Co.*, 301 NLRB 1008 (1991)).

To similar effect, *NLRB v. Malta Construction Co.*, supra; *Mack's Supermarkets*, 288 NLRB 1082 (1988); *Control Services*, 303 NLRB 481 (1991); *Highland Superstores*, 301 NLRB 199 (1991); *Ideal Macaroni*, 301 NLRB 507 (1991); *Christie Electric Co.*, 284 NLRB 740 (1987); *Machinery Rebuilders*, 248 NLRB 881 (1980).

Under the circumstances here, the ban on the wearing of IUE caps through limiting employees to wearing Respondent's caps followed a period in which both IUE and Respondent's were worn and while an IUE organizing campaign was underway, coupled with disparate enforcement of the ban, were obviously designed to limit employees who desired to do so from expressing their union solidarity while promoting the continued expression of company support by the wearing of Respondent's cap. Since the wearing of caps was optional, this meant any employee who wanted to wear a cap could only wear a company cap during the second IUE campaign preceding the second election and IUE supporters during the second campaign could not, as during the first campaign, express union solidarity by wearing an IUE cap, while employees who opposed IUE representation could express their support for Respondent's antiunion policy by wearing a company cap.

On the basis of the foregoing, I find and conclude Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a rule or policy limiting cap wearers to the wearing of a cap containing Respondent's insignia and disparately enforcing its ban on the wearing of a cap containing IUE insignia.

2. The election objections

I have entered findings and conclusions Respondent violated Section 8(a)(1) of the Act prior to the second election by promulgating, maintaining, and enforcing rules or policies barring unit employees from soliciting other employees, either on worktime in work areas or in nonwork areas on nonworking time, without Respondent's permission and from distributing literature under either circumstance without Respondent's permission, and by its disparate enforcement thereof.

I have also entered findings and conclusions Respondent violated Section 8(a)(1) of the Act prior to the second election by promulgating, maintaining, and a rule or policy requiring employees who desired to wear caps within the plant to wear caps containing Respondent's insignia, permitting a nonsupporter of IUE to wear a cap with Respondent's insignia which nonsupporters of IUE received from Respondent and wore during the first election campaign prior to the first election, while barring IUE supporters from wearing the caps they wore during the first election campaign prior to the first election with IUE insignia.

The two IUE election objections are based on Respondent's disparate enforcement of the rules just cited; i.e., permitting Eliseo Gonzalez to solicit employees to vote against IUE representation and to wear ''Vote No'' stickers during working time within working areas while barring such conduct by IUE supporters and by encouraging and permitting employees to wear caps containing Respondent's insignia while barring employees from wearing caps containing IUE insignia.

I thus find merit in both of the IUE objections and conclude by that conduct, as well as the other unfair labor practices set out in the preceding section, Respondent prevented a free and fair election on September 20.

3. The ballot challenges

I have entered findings and conclusions that Gonzalez Sr. was neither a supervisor nor an agent of Respondent acting on its behalf within the meaning of Section 2 of the Act on September 20 and that Andrada, Bautista, Merez, and Moya were not employees of Respondent on September 20. On the basis of those findings and conclusions, plus the resolution of the balance of the 15 challenges during the hearing by agreement of the parties, I normally would recommend the ballots of Acy, Aarrendondo, Espanioza, Garcia, Gonzalez Sr., Haig, Sanchez, Torres, and Vega be opened and counted and the ballots cast by Andrada, Bautista, Merez, Mora, Moya, and Setz be rejected, a revised tally of ballots and an appropriate certification issued.

In this case, however, I have entered findings and conclusions Respondent committed unfair labor practices prior to the election which prevented a free and fair election.

I therefore recommend instead the September 20 election be set aside and a new election conducted when, in the judgment of the Regional Director for Region 16, the effects of the unfair labor practices have been dissipated. As the Board stated in *Video Tape Co.*, 288 NLRB 646, 665 (1989):

> Respondent's unfair labor practices, which occurred during the critical period between the filing of the petition and the election, sufficiently interfered with the employees' freedom of choice to select a bargaining representative to require setting aside the election.

To similar effect, *Pentre Electric*, 305 NLRB 882 (1991).

CONCLUSIONS OF LAW

1. At all pertinent times Respondent was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

2. A unit consisting of all production and maintenance employees, including wood shop, leather shop, shipping, receiving, pattern cutting and research and development departments and customer service employees employed by Respondent at its Carrollton, Texas facilities, excluding all other employees, professional employees, confidential employees, office employees, truckdrivers, guards and supervisors as defined in the Act, at all pertinent times constituted an appropriate unit for collective-bargaining purposes within the meaning of Section 9 of the Act.

3. Respondent violated Section 8(a)(1) of the Act and prevented a free and fair election on September 20 by promulgating, maintaining, and enforcing the following rules or policies during the second IUE campaign prior to the September 20 election:

(a) Requiring unit employees to secure Respondent's permission prior to soliciting other employees or distributing literature to other employees.

(b) Requiring unit employees to secure Respondent's permission prior to posting literature within the plant.

(c) Prohibiting unit employees from discussing their and other employees' wages.

(d) Prohibiting unit employees from generating or encouraging rumors.

(e) Prohibiting unit employees from discussing with representatives of the media any information about Respondent, its policies and practices.

(f) Requiring unit employees to promise to comply with Respondent's antiunion policy.

(g) Barring employees who chose to wear caps within the plant from wearing caps bearing IUE insignia.

4. Respondent violated Section 8(a)(1) of the Act and prevented a free and fair election on September 20 by its disparate enforcement of its rules or policies regarding employee solicitations of employees, employee distribution of literature, employee postings within the plant, and wearing of caps.

5. On September 20 Eliseo Gonzalez Sr. neither was a supervisor nor an agent of Respondent acting on its behalf within the meaning of Section 2 of the Act.

6. On September 20 Maria Andrada, Genera Bautista, Refugio Merez, and Martha Moya were not Respondent employees.

7. The aforesaid unfair labor practices and prevention of a free and fair election affected commerce as defined in Section 2 of the Act.

THE REMEDY

Having found Respondent engaged in unfair labor practices, I recommend Respondent be directed to cease and desist therefrom and to take affirmative actions designed to effectuate the policies of the Act.

Having found Respondent violated the Act by promulgating, maintaining, and enforcing rules or policies which interfered with, restrained, and coerced unit employees in the exercise of their rights under Section 7 of the Act, I recommend Respondent be directed to rescind its rules or policies requiring unit employees to secure its permission prior to soliciting other employees, distributing literature to other employees and posting literature within the plant, barring its unit employees from discussing with other employees their and other employees' wages, barring employees from generating or encouraging rumors, barring unit employees from discussing with representatives of the media Respondent's policies and practices, barring unit employees who wish to wear caps within the plant from wearing any caps other than caps distributed by Respondent bearing Respondent's insignia, and requiring its employees to promise in writing to support Respondent's antiunion policy.

I further recommend Respondent be directed to notify employees who have signed a statement promising to comply with Respondent's antiunion policy they are not required to comply with that policy and that Respondent be directed to enforce its rules or policies with respect to unit employees who support the IUE or any other labor organization in the same manner it enforces those rules or policies with respect to unit employees who do not support the IUE or any other labor organization.

I further recommend the September 20 election be set aside and the Regional Director for Region 16 be directed to conduct a new election when, in his judgment, the effects of the aforesaid unfair labor practices have been dissipated.

[Recommended Order omitted from publication.]